

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCOMM/E 280 OF 2020

PLAYSTOCK CAPITAL LIMITED.....PLAINTIFF/APPLICANT

VERSUS

AIG KENYA INSURANCE COMPANY LTD.....DEFENDANT/RESPONDENT

RULING

Introduction

1. In order to put the Plaintiff's/applicant's application dated 7th August 2020 into a proper perspective, it is important to bring into view, albeit briefly, the factual matrix which triggered these proceedings. A succinct appraisal of the contested and the uncontested facts presented by the parties will serve this salutary purpose.

2. The factual background is partly uncontroverted and partly disputed. It is admitted that the Plaintiff insured its motor vehicle registration **KCW xxxx** with the defendant against the risks covered under the policy and that the policy was valid from 27th September 2019 to 26th September 2020. The said vehicle was involved in a road traffic accident during the subsistence of the said cover as a consequence of which it was damaged and the Plaintiff claimed indemnity from the defendant for recovery of the loss incurred.

3. The point of divergence is that the defendant states that it repudiated liability on grounds that:- the accident did not occur at the place the Plaintiff claims it occurred; that the vehicle was being used for sporting/racing/competition at or around Masinga Air strip, an activity which was excluded from the cover; and, that at the material time the vehicle was being driven by a different person and not the person the Plaintiff claimed was driving. The Plaintiff's account on the manner in which the accident occurred, the scene of the accident, and the driver and use of the vehicle at the material time are contested matters. The other point of divergence is that whereas the Plaintiff accuses the defendant for breach of the insurance contract, the defendant accuses the Plaintiff of acting in utmost bad faith contrary to the insurance policy.

4. Against the above background, the applicant in its Complaint prays for: -

a. A declaration that the defendant is liable and/or duty bound under the policy and/or bound by contract to compensate and or settle any claims arising from the aforesaid accident in respect of the insured's motor vehicle registration KCW xxxx.

b. The defendant be compelled to indemnify the Plaintiff by honouring and or satisfying the claims, costs and interests over the motor vehicle registration number KCW 085 W.

c. Particulars of special damages

i. Police Abstract Kshs. 100/=

ii. Towing charges Kshs. 180,000/=

iii. Value of motor vehicle Kshs. 17,300,000/=

iv. Loss of use at the rate of

48,000/= per day as from

20/2/20 Kshs..... 7,632,000/=

Total.. Kshs..... 25,112,100/=

d. Costs of the suit and interests on (b) from date of filing the suit.

e. Any other relief this honourable court may deem fit and just to grant.

The application

5. Contemporaneous with the Plaintiff, the applicant filed a Notice of Motion of even date anchored on Sections **IA, 1B, 3A** Civil Procedure Act, [1] Order **51** of the Civil Procedure Rules, 2010 and all other enabling provisions of the law seeking the following orders: -

i. ***Spent.***

ii. ***Spent.***

iii. ***That*** this Honourable Court be pleased to compel the Respondent to indemnify the Applicant by honouring and/or satisfying the claims, cost and interest over the motor vehicle registration number **KCW xxxx** from the liability incurred pending the hearing and determination of the suit.

iv. ***That*** the costs of this application be provided for.

The grounds relied upon

6. The applicant states that the vehicle was valued at **Kshs. 17,300,000/=**, it paid a premium of **Kshs. 740,357/=**, but the defendant has failed to satisfy the claim by failing to either repair the vehicle or compensate the Plaintiff for the its value occasioning it financial loss.

The Respondent's Replying affidavit

7. Jane Njau, the Respondent's Claims Manager-Personal Insurance Claims swore the Replying Affidavit dated **2nd** September 2020 in opposition to the application. The nub of her affidavit is three-fold. ***One***, that the declaratory order sought by the applicant should not issue at an interlocutory stage as its effect is to determine the dispute and that the applicant has not demonstrated any exceptional circumstances in to warrant issuance of an interlocutory, mandatory injunction. ***Two***, that the insurance policy contained a limitation excluding use for racing, competitions, rallies or trials, including use for practice for any of them. ***Three***, that Condition No. **9** provides that if any claim is found to be fraudulent or the applicant or any one acting on behalf has given false information, the applicant would lose any rights under the Policy.

8. She averred that applicant claimed that the Vehicle was being driven by one Victor Nyawanda who claimed that while travelling to Masinga Dam Resort to attend a meeting he swerved to avoid hitting a child. She deposed that a report by private investigators revealed that the Vehicle was not being driven by Victor Nyawanda as claimed but by a different person at a motor show racing at the Masinga airstrip. Further, that, a video recording of the movement of the Vehicle and accident circulated on social media showed two young men inside a Bentley motor vehicle racing at the Masinga airstrip when the accident occurred, and upon interviewing an independent eye witness who hails from the nearby Katothya village in Masinga a one Peter Mutunga Silu it emerged that *the accident did not occur at the scene where the applicant claimed i. e. along Kaewa-Masinga road but rather within the Masinga dam airstrip, and, that the Vehicle was racing along the Masinga dam airstrip and the accident occurred as a result of the person driving it surpassing the tarmac, hitting a trench while at high speed, losing control and overturning.*

9. She deposed that vide a letter dated **18th** August 2020 she highlighted to the applicant material inconsistencies which amount to misrepresentation of material facts, contrary to the doctrine of utmost good faith and advised that the claim was not admissible and that the matter would be referred to the Insurance Regulatory Authority/s Fraud Investigation Unit for further action. Hence, the application has been brought in bad faith, it is an abuse of the court process and it ought to be dismissed with costs.

Applicant's advocates submissions

10. Miss Okoth, counsel for the Plaintiff distilled two issues, namely, whether the applicant and the Respondent had a valid contract at the time of the accident; and two, whether the Respondent is liable and/or duty bound to repair or compensate any claims arising from the accident involving the insured motor vehicle. She submitted that both parties had entered into a contract of insurance covering the period **27th** September 2019 **26th** September 2020.

11. She argued that the contract entailed indemnifying the applicant against any liability which might be incurred by him either repairs or compensation out of the use of the insured motor. She submitted that the motor vehicle was involved in an accident, hence the Respondent under the contract is duty bound to compensate or settle any claims arising from the accident. To buttress her argument, she cited *George Onyango Lifwa v Madison Insurance Co. Kenya Ltd* [2] in which the Plaintiff was awarded material damages upon proving the existence of a contract under which the defendant was required to indemnify the Plaintiff in the event of loss or theft of the insured motor vehicle. She submitted that under the subject contract the Respondent is obligated to indemnify the insured by reinstating the motor vehicle to its pre-accident state and/or compensating the applicant for any loss incurred due to an accident or damage on the motor vehicle.

12. Miss Okoth cited *Concord Insurance Company Limited v David Otieno Alinyo. & Another* [3] in which the court cited *Darbishire v Warran* [4] which held that the principal of restitution puts the plaintiff in the same position as though the damage never happened. She also cited *British American Insurance Company Limited v George Mokaya Ondieki* [5] in which the court held that the defendant was under contract to indemnify the Plaintiff for the value of the motor vehicle and the loss of use of the motor vehicle. She also relied on *ICEA Lion General Insurance Co Ltd v Board of Governors Rioma Mixed Secondary School & 24 Others* [6] in which the court dismissed a declaratory suit that the insurer was not liable under the policy to settle claims arising from the loss or damage of the insured vehicle. She submitted that the accident is not denied, hence, the Respondent is under the contract required to indemnify the applicant.

13. She argued that the respondent's refusal to settle the claim is unreasonable and a breach of the contract. She cited *Kenya Alliance Insurance Co. Ltd v Bernard Okeyo Ajwang* [7] in which the court dismissed the appellant's claim that the Respondent gave false information

regarding the subject accident and urged the court not to permit the Respondent to avoid a valid contract.

The defendant's advocates submissions

14. The defendant's counsel citing a passage from the Court of Appeal decision in *Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others*[8] that ". . . it has often been stated that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage." Counsel argued that the peculiar facts of this case militate against granting the interlocutory prayers without the benefit of a trial. He cited *Oksana Investment Supplies Ltd v Alice Wanjiru Wamwea*[9] which observed that the prayers sought in the Plaintiff were similar to those sought in the application and urged the court to note the similarity in the prayers in the application and in the Plaintiff. He argued that granting the prayers at this interlocutory stage is tantamount to allowing the Plaintiff. He urged the court to dismiss the application with costs.

15. Additionally, the Respondent's counsel submitted that the applicant has not demonstrated any exceptional circumstances to warrant the grant of an interlocutory, mandatory injunction as sought. He argued that the peculiar circumstances of this case should be interrogated at a full trial and cited *Kenya Breweries Ltd & Another v Washington O. Okeyo*[10] in the Court of Appeal citing *Halsbury's Laws of England*[11] restated the tests for granting mandatory injunctions. (also cited *Locabail International Finance Ltd v Agroexport and others*[12] for a similar holding). He submitted that the applicant has not established special circumstances to warrant the said order. Lastly, counsel submitted that the decisions cited by the applicant's counsel were arrived at after a full hearing as opposed to interlocutory applications. He urged the court to dismiss the application with costs.

Determination

16. The key question in this application is whether the applicant is inviting this court to grant a final order or an interlocutory order. To my understanding, the answer to this question can be gleaned from the nomenclature employed in the prayer(s) sought in the application and the plaintiff. The prayer in the application reads: -

That this Honourable Court be pleased to compel the Respondent to indemnify the Applicant by honouring and/or satisfying the claims, cost and interest over the motor vehicle registration number KCW xxxx from the liability incurred pending the hearing and determination of the suit.

17. The question is whether the above prayer as framed is a purely interlocutory prayer. Should the court grant the said prayer as framed, will it have essentially determined the party's rights. Will there be a dispute remaining for resolution? I had earlier reproduced the prayers in the Plaintiff. I see no need to rehash them here. Instead, I will address the above pertinent questions. Despite the fact that these are highly dispositive questions, the applicant's counsel never attempted to address her mind to them at all. In fact the issues framed and addressed by Miss Okoth, counsel for the Plaintiff and indeed her entire submissions leave no doubt that she was addressing the final dispute as opposed to an interlocutory application. The issues she addressed are whether the applicant and the Respondent had a valid contract at the time of the accident; and whether the Respondent is liable and/or duty bound to repair or compensate any claims arising from the aforementioned accident in respect of the insured motor vehicle. Her submissions were targeted at the Plaintiff as opposed to the application. In my view, the prayer in the application and the issues framed by the applicant's counsel raise contested issues of facts which can only be resolved after a full trial. On his part, the Respondent's counsel was of the view that the order sought is in the nature of a mandatory injunction which can only be granted in exceptional circumstances.

18. In my view, the question is whether the order sought in the application is interlocutory or final. If it is interlocutory, it can be considered on merits. On the other hand, if it is final and has the potential of determining the case, the application is for dismissal.

19. Defining an interlocutory order is a useful starting point. A purely interlocutory order is one not having the effect of a final decree. In a wide and general sense, the term "interlocutory" refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as "simple (or purely) interlocutory orders" or "interlocutory orders proper," which do not have a final effect on the main action.

20. Thus, when one reads the words 'interlocutory order' one understands it normally in the context of many types of interlocutory orders. Some of which may be final with all the three attributes of a definitive judgment while others may even be rulings in the wider sense of the word. (I will discuss the three attributes shortly). If an interlocutory order has the three attributes normally used to determine whether the order in question is final in effect and definitive of the rights of the parties, then even if it is interlocutory in the wider sense, the order in question is final in effect. An order is purely interlocutory unless it anticipates or precludes some of the reliefs which would or might be given at the hearing.

21. A reading of the Plaintiff and the order sought in this application shows that it has all the three attributes of a final order, it is not a simple interlocutory order. The three attributes of a final order were set out by the South African Appellate Division in *Zweni v Minister of Law-and-Order*[13] namely; (i) the decision must be final in effect and not susceptible to alteration by the Court of first instance; (ii) it must be definitive of the rights of the parties, i.e. it must grant definite and distinct relief; and (iii) it must have the effect of disposing of at least a substantial portion (if not all) of the relief claimed in the main proceedings.

22. As was held in *Ashok Kumar Bajpai v Dr. (Smt) Ranjama Baijai*[14] the court should not grant interim relief which amounts to final relief except in exceptional circumstances where the court is satisfied that ultimately the applicant is bound to succeed, the Court may grant the relief but it must record reasons for passing such an order and make it clear as what are the special circumstances for which such a relief is being granted to a party.

23. In *Burn Standard Co. Ltd. and Ors. v. Dinabandhu Majumdar and Anr*[15] the Supreme Court of India deprecated the practice of granting interim reliefs which amounts to final relief. The court however stated that in exceptional circumstances, where for one reason or the

[5] {2019} e KLR.

[6] {2016} e KLR.

[7] {2019} e KLR.

[8] {2016} e KLR.

[9] {2019} e KLR.

[10] {2002} e KLR.

[11] Vol. 24 Halsbury's Laws of England 4th Edition.

[12] {1986} 1 ALLER 901.

[13] 1993 (1) SA 523 (AD).

[14] AIR 2004, All 107, 2004 (1) AWC 88, at paragraph 17.

[15] AIR 1995 SC 1499.

[16] 2005 (5) SA 433 (SCA) para 40 citing *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7 F. 6

[17] {1952} EA 425.

[18] As observed in *State of Orissa vs. Sudhansu Sekhar Misra* MANU/SC/0047/1967

[19] *Ambica Quarry Works vs. State of Gujarat and Ors.* MANU/SC/0049/1986

[20] Ibid

[21] *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59)

[22] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, *Prashant Vats Versus University of Delhi & Anr.* (Citing Lord Denning).

[23] Ibid

[24] Ibid